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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/777,886	02/11/2004	Davide Bergamasco	ANDIP039/425657	6719

22434 7590 08/03/2009  
Weaver Austin Villeneuve & Sampson LLP  
P.O. BOX 70250  
OAKLAND, CA 94612-0250

EXAMINER
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JEAN GILLES, JUDE

ART UNIT	PAPER NUMBER
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2443

MAIL DATE	DELIVERY MODE
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08/03/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/777,886	<b>Applicant(s)</b> BERGAMASCO ET AL.	
	<b>Examiner</b> JUDE J. JEAN GILLES	<b>Art Unit</b> 2443	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 15 April 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 11 February 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>03/17/2005, 05/13/2008, 11/18/2008, and 03/06/2009</u> .    | 6) <input type="checkbox"/> Other: _____                          |



## **DETAILED ACTION**

This Office Action is in reply to communication filed on 04/15/2009.

### ***Information Disclosure Statement***

1. The information disclosure statement (IDS) submitted on 03/17/2005, 05/13/2008, 11/18/2008, and 03/06/2009 has been considered by the examiner.

### ***Response to Election/Restriction***

2. The Restriction Requirement dated march 17, 2009 has been fully considered based on applicant's argument, and has been withdrawn.

### ***Double Patenting***

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

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Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1-26 provisionally rejected on the ground of nonstatutory double patenting over claims 1-69 of copending co-pending U. S. Application with a publication number 20030115355. This is a provisional double patenting rejection since the conflicting claims have not yet been patented.

The subject matter claimed in the instant application is fully disclosed in the referenced copending application and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter, as follows: "a frame having the following: a source identifier corresponding to a destination node; a destination identifier corresponding to the edge device; an exchange identifier corresponding to an exchange being transmitted by the edge device to the destination node; and an instruction from a node within the Fibre Channel network to the edge device, the instruction indicating that an exchange originated by the edge device is causing network congestion; and implementing a congestion reaction mechanism at the edge device in accordance with the instruction".

Furthermore, there is no apparent reason why applicant would be prevented from presenting claims corresponding to those of the instant application in the other copending application. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

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Claims 1-26 of US Application No. 10/777886 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 - 14 of U.S. Patent No. 7042842 B2. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 1 - 14 of the U.S. Patent mentioned above, contain every element of claims 1 - 26 of the instant application and thus **anticipate** the claims of the instant application. Claims 1- 26 of the instant application are therefore not patently distinct from claim 1 - 14 of the U.S. Patent No. 7042842 and as such are unpatentable over obvious-type double patenting.

Claims 1-26 of US Application No. 10/777886 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 - 15 of U.S. Patent No. 6,970,424 B2. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 1 - 14 of the U.S. Patent mentioned above, contain every element of claims 1 - 26 of the instant application and thus **anticipate** the claims of the instant application. Claims 1- 26 of the instant application are therefore not patently distinct from claim 1 - 15 of the U.S. Patent No. 6,970,424 and as such are unpatentable over obvious-type double patenting.

**Conclusion**

5. ***This action is made Non-Final.*** Any inquiry concerning this communication or earlier communications from examiner should be directed to Jude Jean-Gilles whose telephone number is (571) 272-3914. The examiner can normally be reached on Monday- Friday from 8:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tonia Dollinger, can be reached on (571) 272-4170. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-3301.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (571) 272-0800.

/Jude J Jean-Gilles/

Primary Examiner, Art Unit 2443

JJG

July 29, 2009